

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE ALFREDO HERNANDEZ-  
 BAILON,

Defendant.

2:05-CR-0445-RCJ-PAL

**O R D E R**

Before the Court for consideration is Defendant Jose Alfredo Hernandez-Bailon's ("Defendant" or "Hernandez-Bailon") Objections to the Report and Recommendation issued by the Magistrate Judge Leen (#26) which recommends that the Court deny Defendant's Motion to Dismiss Based on a Prior Unlawful Deportation (#14). The Court has reviewed all relevant pleadings on file and has heard oral argument on behalf of all parties. IT IS HEREBY ORDERED that Defendant Hernandez-Bailon's Objections to the Report and Recommendation issued by the Magistrate Judge Leen (#26) are *overruled*, and Defendant's Motion to Dismiss Based on a Prior Unlawful Deportation (#14) is *denied*.

**BACKGROUND**

On June 10, 2003, Defendant Hernandez-Bailon was charged with Possession of Stolen Property in violation of Nevada Revised Statutes ("NRS") § 205.275. He pleaded guilty to that offense on September 26, 2003. As a result, Defendant received a suspended sentence of 12 to 32 months incarceration and was placed on three years probation. Hernandez-Bailon was subsequently arrested for Aiming a Firearm at a Human Being in Las Vegas, NV. Consequently, on July 5, 2004, the Bureau of Immigration and Customs Enforcement ("ICE") placed a detainer on him. On July 12, 2004, a Notice of Intent to Issue a Final Administrative Removal Order ("Notice of Intent") was issued against Hernandez-Bailon alleging that (1) he was not a citizen or national of the United States; (2) he was a native and citizen of Mexico; (3) he entered the United States at or near Nogales, AZ on or about January 1, 1993; (4) at that time he was not admitted or paroled after inspection by an Immigration Officer; (5) that he was not admitted for permanent residency; (6) he was convicted on September 25, 2003, in Nevada for Possession of Stolen Property, in violation of NRS § 205.275; and (7) for that offense he was sentenced to a period of confinement for a maximum of 32 months and a minimum of 12 months. Hernandez-Bailon was served with this Notice of Intent on October 16, 2004, while he was serving a Nevada state sentence imposed on September 29, 2004, for an additional offense, Attempted Theft and Placing Graffiti. Hernandez-Bailon indicated he wanted to contest his deportability by marking the appropriate box on the Form I-851 Certificate of Service for the Notice of Intent, which he returned to ICE.

According to Hernandez-Bailon, he was released to the ICE detainer on November 16, 2004. That same day, Hernandez-Bailon's attorney, Rolando Velasquez, filed a bond redetermination request, which was set for hearing the next morning. A copy of the bond

1 request was served on ICE the same day it was filed. Mr. Velasquez appeared at the bond  
2 redetermination hearing on November 17, 2004, but was told by the ICE Assistant Chief  
3 Counsel that Hernandez-Bailon was no longer in Immigration custody. Also on November  
4 17, 2004, the Final Administrative Removal Order was signed indicating that Hernandez-  
5 Bailon was to be deported pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). The Final  
6 Administrative Removal Order was served on Hernandez-Bailon on November 18, 2004.  
7 The Record of Persons and Property Transferred, Form I-216J, indicates that Hernandez-  
8 Bailon was removed on November 18, 2004. On November 22, 2004, Mr. Velasquez  
9 became aware of Hernandez-Bailon's removal, and wrote a letter to ICE for inclusion in the  
10 administrative file, arguing that Hernandez-Bailon's removal was in error.

11 On November 23, 2005, Defendant Hernandez-Bailon was charged in a criminal  
12 indictment with one count of Unlawful Reentry by a Deported Alien in violation of 8 U.S.C.  
13 § 1326. The indictment charges that he was deported and removed from the United States on  
14 or about November 18, 2004, and between June 10, 2005, and October 27, 2005, he returned  
15 and was found in the United States without authorization.

16 On January 6, 2006, Defendant filed a Motion to Dismiss Based on a Prior Unlawful  
17 Deportation (#14). Defendant argues that his original deportation violated his due process  
18 rights and that he was prejudiced thereby. On March 27, 2006, Magistrate Judge Leen  
19 entered her Report and Recommendation (#23). The Magistrate Judge found that Defendant  
20 was removed prior to the expiration of fourteen days from the final order of removal, contrary  
21 to statute, and thus Defendant did not receive an adequate opportunity to seek judicial review.  
22 She also found that the mischaracterization of Defendant's state conviction as an aggravated  
23 felony and his premature removal constituted due process violations. However, the  
24 Magistrate found that Hernandez-Bailon was not prejudiced by these due process violations

1 because he cannot establish that he had plausible grounds for relief from removal through  
2 voluntary departure, cancellation of removal, or waiver of excludability.

### 3 DISCUSSION

4 The principal issue now before the Court is whether Defendant Hernandez-Bailon was  
5 prejudiced by a deprivation of his due process rights in conjunction with his deportation. The  
6 Magistrate Judge found that a due process violation occurred, but Defendant did not suffer  
7 prejudice therefrom. Defendant now argues that he did in fact suffer prejudice because he  
8 was entitled to removal through voluntary departure.<sup>1</sup>

#### 9 I. Legal Standard

10 To attack the validity of a prior deportation order in this context, the Ninth Circuit has  
11 held that a defendant must demonstrate (1) his due process rights were violated by defects in  
12 his underlying deportation proceeding, and (2) he suffered prejudice as a result of the  
13 violation. See, e.g., United States v. Proa-Tovar, 975 F.2d 592, 594–95 (9th Cir. 1992) (en  
14 banc). Therefore, if Hernandez-Bailon cannot establish prejudice, the Court must deny his  
15 Motion to Dismiss Based on a Prior Unlawful Deportation (#14), even assuming a due  
16 process violation occurred.

17 When a petitioner moves to dismiss an indictment under 8 U.S.C. § 1326 based on a  
18 violation of due process in the underlying removal proceeding, he must show that prejudice  
19 resulted from the violation of his due process rights. See United States v. Muro-Inclan, 249  
20 F.3d 1180, 1184 (9th Cir. 2001). “To establish prejudice, petitioner does not have to show  
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23 <sup>1</sup>Defendant does not contend that he was entitled to cancellation of removal or waiver of  
24 excludability, and thus this Court will only consider whether he had a plausible right to voluntary  
25 departure.

1 that he actually would have been granted relief. Instead he must only show that he had a  
2 ‘plausible’ ground for relief from deportation.” Id. (citation and internal quotation omitted).

3 **II. Viability of Voluntary Departure**

4 **A. Due Process Violations**

5 The Magistrate Judge found that Defendant’s due process rights were violated during  
6 the underlying deportation proceeding:

7 Hernandez-Bailon was placed in expedited administrative removal  
8 proceedings governed by 8 U.S.C. § 1228 as an alien not admitted or paroled  
9 after inspection or lawfully admitted for permanent residence who had been  
10 convicted of an aggravated felony. The final administrative removal order was  
11 served on Hernandez-Bailon on November 18, 2005, the same day he was  
12 physically removed, without affording him the right under the statute to seek  
13 judicial review of the final administrative order within fourteen calendar days  
14 after the date of its issuance. The expedited administrative removal proceeding  
15 was, therefore, procedurally flawed to the extent that it eliminated Hernandez-  
16 Bailon’s right to judicial review.

17 (Magistrate’s Report and Recommendation at 15.)

18 This Court agrees with the Magistrate’s determination that Defendant’s guilty plea to  
19 Possession of Stolen Property in violation of NRS § 205.275 did not constitute an aggravated  
20 felony. Neither party provided the Court with a plea agreement or transcript of the plea  
21 hearing indicating the precise elements of the offense to which Defendant pleaded guilty.

22 The judgment of conviction only states that Hernandez-Bailon pleaded guilty to the crime of  
23 Possession of Stolen Property and received a suspended sentence of 12 to 32 months.

24 Applying the modified categorical approach, it is impossible to determine from the  
25 documents on record that Defendant pleaded guilty to the aggravated felony generically  
described as a “theft offense.” See United States v. Corona-Sanchez, 291 F.3d 1201, 1211

1 (9th Cir. 2002) (en banc); Chang v. INS, 307 F.3d 1185, 1189 (9th Cir. 2000). Because it is  
2 impossible to conclude that Defendant pleaded guilty to an aggravated felony, the  
3 Government violated his due process rights by employing expedited administrative removal  
4 proceedings under 8 U.S.C. § 1228(b) rather than providing Defendant with 14 days after the  
5 issuance of the final administrative order in which to seek judicial review as required by 8  
6 U.S.C. § 1228(b)(3). Therefore, this Court agrees with the Magistrate that Defendant  
7 Hernandez-Bailon's due process rights were violated. However, Hernandez-Bailon must also  
8 show that he was prejudiced by the due process violation.

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10 **B. Prejudice**

11 To establish prejudice, Hernandez-Bailon argues that he had a plausible ground for  
12 relief through voluntary departure. Voluntary departure is a form of discretionary relief. It is  
13 a privilege created by Congress, and aliens have no fundamental right to discretionary relief  
14 from removal for purposes of due process and equal protection. Munoz v. Ashcroft, 339 F.3d  
15 950, 954 (9th Cir. 2003). "[V]oluntary departure is intended, in part, to allow an alien faced  
16 with removal to have a reasonable period of time before departing to make arrangements for  
17 any interests he or she may have in the United States." Tovar-Landin v. Ashcroft, 361 F.3d  
18 1164, 1167 (9th Cir. 2004). The Ninth Circuit has held that although the agency has great  
19 latitude in exercising its discretion to grant or deny a request for voluntary departure, the  
20 agency "must weigh both favorable and unfavorable factors." De la Luz v. INS, 713 F.2d  
21 545 (9th Cir. 1983). The agency "is required to weigh favorable and unfavorable factors by  
22 evaluating all of them, assigning weight or importance to each one separately and then to all  
23 of them cumulatively." Campos-Granillo v. INS, 12 F.3d 849, 852 (9th Cir. 1994) (internal

1 citations and quotations omitted). The Ninth Circuit has identified the following relevant  
2 factors for consideration in determining whether to grant voluntary departure:

3 Favorable factors include: family ties within the United States; residence of  
4 long duration in this country, particularly if residence began at a young age;  
5 hardship to the petitioner or petitioner's family if relief is not granted; service  
6 in the United States armed forces; a history of employment; the existence of  
business or property ties; evidence of value and service to the community;  
proof of rehabilitation if a criminal record exists; and other evidence attesting  
to good character. . . .

7 Unfavorable factors include: the nature and underlying circumstances of the  
8 exclusion or deportation ground at issue; additional violations of the  
immigration laws; the existence, seriousness, and recency of any criminal  
9 record; and other evidence of bad character or the undesirability of the  
applicant as a permanent resident.

10 Id. at 852 n.8.

11 There are some factors that weigh in Defendant Hernandez-Bailon's favor. First,  
12 Defendant has family ties in the United States. His immediate family, including both of his  
13 children, lives in the United States. Second, Defendant was only eight or nine years old at the  
14 time he first entered the United States. He was twenty years old at the time of removal.  
15 Third, Defendant, though relatively young, had a stable employment history in the United  
16 States.

17 Although the factors mentioned above weigh in Defendant's favor, they are ultimately  
18 outweighed by several unfavorable factors. Defendant, though only twenty years old at the  
19 time of removal, had an extensive criminal history. At the time of removal, Defendant had  
20 served six grants of probation for juvenile charges, and had been placed on probation as an  
21 adult for the felony conviction of Possession of Stolen Property. Four days after the end of  
22 his felony probation, Defendant was arrested for burglary and applying graffiti. Defendant  
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1 spray-painted gang graffiti on several residences and broke into vehicles. Less than two  
2 months later, Defendant was again arrested, this time for aiming a firearm at another person.

3 Defendant argues that his strong family connections in the United States could  
4 plausibly outweigh his criminal history in the mind of some court, and thus he is entitled to  
5 relief. See United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000) (holding that  
6 voluntary departure is appropriate if the defendant demonstrates that he had “a plausible  
7 ground for relief from deportation” (internal quotations omitted)). This Court disagrees.  
8 Defendant has not provided evidence to demonstrate that his removal will constitute family  
9 difficulties beyond those ordinarily present in deportation cases. While Defendant’s two  
10 children live in the United States, Defendant is not their primary care giver. Due to  
11 Defendant’s criminal history, the children’s mother and grandparents care for them. Even if  
12 Defendant provides some financial support for his family, this, standing alone, does not  
13 constitute the “extreme hardship necessary to justify relief. . . . [S]omething more is required  
14 to remove the case from the ‘typical’ hardship category.” Id. at 1082. While documentation  
15 of severe non-financial family consequences might persuade a court to grant relief, Defendant  
16 has simply not presented any evidence that his family will suffer extraordinary emotional  
17 trauma if he is deported. Cf. Id. (granting relief because defendant demonstrated “extreme  
18 hardship” because he was needed to raise his younger siblings because his mother was in very  
19 poor health in the United States). In this case, Defendant’s children live with their mother  
20 and grandmother, and thus would not suffer undue hardship so as to outweigh the extensive  
21 evidence of Defendant’s bad character and criminal history. Defendant Hernandez-Bailon’s  
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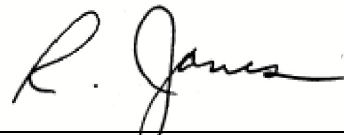
1 criminal history is extensive, and while his family will surely suffer following Defendant's  
2 removal, such suffering is not so extraordinary as to constitute extreme hardship in this case.

3 These factors convince the Court that Defendant Hernandez-Bailon did not have  
4 plausible grounds for receiving voluntary departure as relief from removal. Therefore, even  
5 assuming that Defendant's due process rights were violated in conjunction with the removal  
6 proceedings, he failed to demonstrate that he suffered any prejudice therefrom.

7  
8 **CONCLUSION**

9 IT IS THEREFORE ORDERED that Defendant Hernandez-Bailon's Objections to  
10 the Report and Recommendation issued by the Magistrate Judge Leen (#26) are *overruled*,  
11 and Defendant's Motion to Dismiss Based on a Prior Unlawful Deportation (#14) is *denied*.

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15 DATED: AUGUST 8, 2006

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20 ROBERT C. JONES  
21 UNITED STATES DISTRICT JUDGE  
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